FILE COPY

Supreme Court of the United States

THE STATE OF SOUTH CAROLINA,

Complainant,

vs.

THE STATE OF NORTH CAROLINA,

Defendant.

BRIEF FOR COMPLAINANT

ON FINAL HEARING.

THOMAS H. PEPPER,
S. M. STEVENS,
Of Counsel for Complainant.

Supreme Court of the United States.

THE STATE OF SOUTH DAKOTA *vs.* THE STATE OF NORTH CAROLINA, CHARLES SALTER & SIMON ROTHSCHILD.	**Original** **Brief for Complainant on Final Hearing.**

Statement.

Complainant by leave of Court filed its bill of complaint in this Court on the 18th day of November, 1901.

Process was duly issued and served on each of the defendants.

On the 2nd day of April, 1902, the State of North Carolina and the defendant Charles Salter filed their several answers.

The defendant Rothschild has not answered, but has made default.

A general replication to the answers was filed by complainant on the 28th day of April, 1902.

Under orders of this Court testimony has been taken by complainant and by defendant the State of North Carolina and by defendant Salter.

The bill is filed to foreclose a statutory mortgage enacted by the State of North Carolina on certain thirty thousand shares of the capital stock of the North Carolina Railroad Company of the par value of one hundred dollars each.

The North Carolina Railroad Company was chartered by the State of North Carolina in 1849 with a capital of $3,000,000 divided into thirty thousand shares of $100 each. Of this capital the State subscribed for twenty thousand shares and others for ten thousand shares (Record, Exhibit E, pp. 135 to 149). For provisions for subscription of State, etc., see pp. 145-6, §§ 36 to 43 inclusive.

Later the State, by law, increased the capital stock by ten thousand shares, preferred while held by the State, and subscribed for the same (Record, Ex. F, pp. 149-150).

The total capital stock of the North Carolina Railroad Company thus became and now is four million dollars, divided into forty thousand shares of one hundred dollars each, of which the State owns thirty thousand shares.

In order to pay its subscription for said stock, the State of North Carolina, pursuant to said laws, issued and sold its thirty-year bonds of one thousand dollars each to the aggregate amount of three million dollars, and as collateral security for the payment thereof and pursuant to said laws mortgaged its thirty thousand shares of stock in the North Carolina Railroad Company.

On Feb'y 15, 1855, the State of North Carolina by law incorporated The Western North Carolina Railroad Company (Record, Ex. A, pp. 116 to 127), and in 1860-1 amended the act of incorporation.

The Act of 1855 on the happening of certain events required the Board of Internal Improvements to direct the Treasurer of the State to subscribe for stock in the said Western North Carolina Railroad Company (§§ 8-9 & 10, pp. 119-120).

It was further provided in said act (§§ 35 *et seq.*, pp. 124 *et seq.*), that in order to pay its subscriptions for stock, the State should issue and sell its coupon bonds, pledging its public faith and its stock in

the *Western* North Carolina R. R. Co. for payment of the same.

Under this law, and the amendment thereto of 1860-1, certain of such bonds were issued and sold.

In 1866 a further amendment was made, a copy of which is Exhibit B, p. 127.

This act recited as follows, viz. :

"WHEREAS, by the combined force of said acts the faith of the State of North Carolina was pledged for the payment of four millions of dollars in bonds of the State, a portion of which have already been issued ; and

WHEREAS it is manifestly the interest of the people of the whole State that the residue of the bonds when issued shall command a high price in the market ;"

The act then goes on to provide that whenever it shall become the duty of the Public Treasurer under said acts to issue bonds of the State to the amount of fifty thousand dollars or more, he is authorized and directed to mortgage an equal amount of stock, which the State now holds in the *North* Carolina Railroad as collateral security for the payment of said bonds.

After the passage of the said Act of 1866, the State of North Carolina issued and sold more of said bonds and duly mortgaged its said stock in the *North* Carolina Railroad Company as collateral security therefor.

The complainant, State of South Dakota, now owns and holds ten of said last mentioned bonds. It obtained title to the same by gift of Simon Schaffer (Record, p. 40).

The gift was accepted by the Governor in pursuance of law, and is absolute, without reservation of any kind or character. One of said bonds is shown in the Record between pp. 38 and 39.

There are now outstanding about two hundred

and fifty of such bonds for one thousand dollars each.

By a law of 1879, Ex. C, p. 129, the Governor of North Carolina was authorized to appoint three Commissioners to "adjust and renew a portion of the State Debt."

This act authorized the Commissioners to issue new forty-year bonds and to exchange the same for the bonds issued by the State to aid in the construction of the North Carolina R. R. Co. on such terms as might be agreed upon; or to sell the new bonds and invest proceeds in purchase of the old bonds; the sale and purchase being at the same rate as the exchange.

By another law of 1879, Ex D, p. 131, provision was made "to compromise, commute and settle the State Debt."

It provided for paying in new thirty-year bonds bearing 4% interest, varying percentages of certain classes of existing bonds, (and among others the bonds issued to aid in the construction of the Western North Carolina Railroad) twenty-five per cent. thereof on surrender and cancellation thereof (p. 132, § 4).

It will be noted that by making this exchange holders of old bonds would lose all lien on the North Carolina Company stock, pledged by the State as collateral security therefor. The act, unlike that respecting the North Carolina Railroad Company, contains no provision continuing the pledge of such stock.

This North Carolina Railroad Company stock has now for many years been very valuable. The income therefrom since 1880 has been sufficient to pay the interest on the bonds of the North Carolina Railroad Company, $163,200 per annum, and leave, $16,800 per annum, making in, say twenty years, $336,000, which the State has received, from property pledged to the bondholders, and has used

for its own purposes, while during the same period it has not paid a penny to the holders of the bonds secured thereby.

The State is now receiving dividends on said stock at the rate of $210,000 per annum, which leaves an excess of $46,800 over the payment of interest on the first mortgage bonds, and it refuses to pay that or any amount to the holders of the bonds having a second lien on said stock (Record, pp. 6 and 114).

The present status is that the State is annually collecting from a security pledge to us the sum of $46,800, which is more than three times the amount necessary to pay the interest on the bonds not converted and now outstanding, being about $250,000, (pp. 6 and 18, paragraph 9).

The complainant claims in its bill that the defendant State and its bond creditors secured by first mortgage on the North Carolina R. R. Co. stock had no power to extend the time of payment of such first mortgage bonds and to cut off the right of redemption of the security by the second mortgage bondholders without their consent, which has never been given.

Argument.

First.—This Court has jurisdiction of this case.

The Constitution, Art. 3, provides that the judicial power of the United States shall extend to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States.

This suit comes within the precise terms of the Constitution.

It would seem to be settled law beyond controversy, that where the language used in a constitution or statute is plain, clear and free from am-

bigunity, there is no room or occasion for interpretation, and that the language must be construed according to its plain meaning and intent.

The authorities to this effect are incredibly numerous and in perfect harmony.

One citation is sufficient—Bate Refrigerating Co. *vs. Sulzberger*, 157 U. S., 1.

The principle itself is axiomatic. "*Quoties in verbis nulla est ambiguitas ibi nulla expositio contra verba fienda est.*"

"Nothing," observed Lord DENMAN, C. J., in a recent case, "is more unfortunate than a disturbance of the plain language of the Legislature by an attempt to use equivalent terms."

Everard *vs.* Poppleton, 5 Q. B., 183.
Gadsby *vs.* Barry, 8 Scott, N.R., 804.

"Where the case is within the words of the rule it must be within its operation. Likewise, unless there be something in the literal construction so obviously absurd or mischievous or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making an exception."

The decision in Chisholm *vs.* State of Georgia, 2d Dallas, 419, that the suit would lie was the occasion for the 11th Amendment to the Constitution.

That amendment was, however, limited to the event of a citizen suing a State. It thus became the most conclusive proof that, as to suits between two or more States, or suits by a State against citizens of another State, it was intended that the provisions of the original Constitution should stand.

Curtis on U. S. Courts (2d Ed., Boston, '96), p. 15, says that the language of the Constitution in this regard "requires no particular comment. One State may sue another State in the Supreme Court

under its original jurisdiction either on the question of boundaries or any other question," and as to the effect of the 11th Amendment, on p. 16 says that the "Eleventh Amendment withdraws the State from any liability to be sued by an individual, but it leaves the State to be sued by another State."

A State is also liable to be sued by the United States in this Court.

U. S. *vs.* Texas, 143 U. S., 621.
U. S. *vs.* N. Carolina, 136 U. S., 211.

The latter of these cases was an *action of debt* brought in this Court by the United States against the State of North Carolina on some of the bonds of that State issued and sold to enable that State to subscribe to and pay for the stock in the North Carolina Railroad Company, which or some of which stock is the subject-matter of this suit.

It does not appear in the report of that case how the United States obtained title to the bonds, but although in that case no question seems to have been made, but that this Court had jurisdiction to entertain and decide the controversy, yet in United States *vs.* Texas, 143 U. S., p. 642, Mr. Justice HARLAN says that "it is true that" in U. S. *vs.* North Carolina "no question was made as to the jurisdiction of this Court and nothing was therefore said in the opinion upon that subject. But it did not escape the attention of the Court and the judgment would not have been rendered except upon the theory that this Court has original jurisdiction of a suit by the United States against a State."

The United States also may be sued by a State in this Court pursuant to a statute (Minnesota *vs.* Hitchcock, 185 U. S., 373).

The opinion of MARSHALL, Ch. J., is most clearly

and forcibly expressed in Cohen *vs.* Virginia, 6 Wheaton, 406–7, as follows:

"It is a part of our history, that, at the adoption of the Constitution, all the States were greatly *indebted*; and the apprehension that these *debts* might be prosecuted in the Federal Courts, formed a very serious objection to that instrument. Suits were instituted; and the Court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the State legislatures. That its motive was not to maintain the *sovereignty of a* State from the *degradation* supposed to attend a *compulsory* appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not *comprehend controversies* between two or more States, or between a State and a foreign state. The jurisdiction of the Court still extends to these cases; and in these a State may still be sued. We must ascribe the amendment, then, to some other cause than the *dignity* of a State. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a State, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not *much reason to fear* that foreign or sister States would be *creditors* to any *considerable* amount, and there was reason to retain the jurisdiction of the Court in those cases, because it might be essential to the *preservation* of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but *not to those brought by States.*"

On p. 378, he said in the same case:

"In the second class, the jurisdiction depends entirely on the character of the parties. In this

are comprehended '*controversies* between *two or more* States, between a State and citizens of another State, and between a State and foreign states, citizens, or subjects'. If *these be the parties*, it is *entirely unimportant what may be the subject of controversy*. *Be it what it may*, these parties have a constitutional right to come into the courts of the Union."

4. The ground of the jurisdiction is that the States have by adopting the constitution *agreed* to submit controversies between themselves to the determination of this Court.

Rhode Island *v.* Massachusetts, 12 Pet., 720.

And, in this agreement, no exception was made of any possible case which might arise. The settlement of claims by diplomacy or by war was taken away by the constitution, and it was necessary to make some provision to take their place. Such provision was made by the organization of this Court and giving it this jurisdiction.

5. Indeed, it is most just that the jurisdiction should be exercised where the plaintiff's claim is for the collection of debt.

Mr. Justice FIELD says: "When a State enters into the markets of the world as a borrower, she for a time lays aside her sovereignty and becomes responsible as a civil corporation."

Louisiana *v.* Jumel, 107 U. S., 740.

And this Court said further, in another case: "The truth is, States and cities, when they borrow money and contract to pay it with interest, are not *acting as sovereignties*. They come down to the level of *ordinary individuals*. Their contracts have the same meaning as that of similar contracts between private persons. Hence, instead of there

being in the undertaking of a State or city to pay, a reservation of a *sovereign right to withhold* payment, the contract should be regarded as an assurance that such a right will not be exercised. A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity."

Murray *v.* Charleston, 96 U. S., 445.

While in New Hampshire *vs.* Louisiana and New York *vs.* Louisiana, 108 U. S., 76, a limitation was put upon the right of a State to sue another State to the effect that the State must have the beneficial as well as the mere legal interest in the cause of action and cannot maintain the action for the benefit of its citizens, and in Louisiana *vs.* Jumel, 107 U. S., 712, that mandamus to execute the duties imposed by law and constitution upon a State officer will not go if the State by a law or amendment to its constitution has forbidden such action, notwithstanding that such law or amendment impairs the obligation of contracts and is therefore void; yet in Missouri *vs.* Illinois, 180 U. S, 208, it was held that the State of Missouri might maintain a bill in equity in this Court to enjoin the State of Illinois and a public corporation thereof, called the Sanitary District of Chicago, from polluting the waters of the Mississippi river.

Many questions are at once suggested in contrasting the cases of New Hampshire *vs.* Louisiana and Missouri *vs.* Illinois.

In the latter case the State of Missouri had no direct interest in the question and she had an indirect interest only as representing *certain* of her citizens who lived near enough to the river to be affected by the alleged wrongs.

In the earlier case New Hampshire had the legal title to the bond sued on, but the assignors, her citizens, were the beneficial owners, and the case

was held to be within the spirit of the 11th amendment, notwithstanding that there can be no doubt but that had New Hampshire and Louisiana been completely independent States New Hampshire would have had the right in behalf of her citizens to assert their claims against Louisiana by way of diplomacy or force.

Such right is of precisely the same character as that which Missouri, in behalf of her citizens, could have asserted against Illinois had they been completely independent States.

Throughout all the controversies in this Court suggestions have been made to the effect that certain controversies were not justiciable in their nature; were political in their character and as between independent nations would fall to the political department of each to decide, and the decision of the political department of each would be conclusive on its Courts.

That it cannot be supposed to have been intended to bring such cases within the jurisdiction of the Courts.

So far as we have been able to find there is no case holding that an action for debt is of such political character and will not lie in favor of or against a State, while there are many cases which were unquestionably of a political nature, *e. g.*, boundaries, where the jurisdiction has been maintained. Indeed, in U. S. *vs.* N. Carolina, 136 U. S., the action was debt, and as we have seen the jurisdiction was maintained.

Second.—Defendant State by its answer says that it denies that there was or is within the meaning of the Constitution any controversy between the complainant and the defendant State (p. 21, para. XV).

Defendant would seem thereby to intimate that

some sort of prior discussion and negotiation, diplomatic or otherwise, must have taken place, resulting in a "controversy", before jurisdiction can attach in this Court. No such position can be well founded. Between citizens of differen Sttates a "controversy" to give jurisdiction arises when one has a cause of action against the other. The commencement of the suit may have been the first knowledge by the obligor of the existence of the obligee: but no one ever heard of a plea by the obligor that, because of that, there was no "controversy" between them, and that, therefore, the United States Courts had no jurisdiction.

No reason can be suggested why the case to which a State is a party, of which this Court has original jurisdiction, should be founded on a "controversy" of any different character from the "controversy" between individuals.

Suppose a suit brought by a State against an individual on a promissory note. Can it be supposed that, in order to give jurisdiction to this Court, any "controversy" is essential before suit brought other than such as is necessary to maintain any action in an other Court? Clearly not.

A controversy exists when a suit, if the controversy be justiciable, can be maintained. In no case of debt assumpsit or like action is a prior demand necessary. The commencement of the suit is a sufficient demand, and where the right to maintain the suit exists the "controversy" exists.

That there is a controversy in this case the answer of the defendant State sufficiently proves.

Third.—The complainant State is competent to become the owner and holder of the obligations of the defendant State.

In Texas *v.* White, 7 Wallace, 700, the State of Texas sued in this Court as the owner of certain

bonds of the United States to enjoin their payment to others than the State of Texas. Jurisdiction was maintained and the injunction granted.

It is incident to the sovereign power both to draw and purchase bills.

U. S. *vs.* Bank, 12 Peters, 377.

Also to become a donee, whether by legacy or otherwise.

Matter of Meriam, 141 N. Y., 479-484.
Estate of Cullom, 5 Miscellaneous Rep., 173; affd. 145 N. Y., 593.
See also U. S. *vs.* Fox, 94 U. S., 315.

It would be strange indeed if with all the rights that are claimed for "sovereign" States they did not have the right to accept a gift.

Nor does Sub. 1, Section 10, Article 2 of the Constitution, which forbids a State to enter into any agreement or compact with another State, affect the right of the complainant to hold these bonds.

The compacts or agreements intended are those of a political nature, such as could be made between sovereigns only. It does not forbid ordinary business agreements, such as could be transacted between individuals, least of all was it intended to forbid the purchase and ownership by one State in the open market of the securities of another.

Union Branch R. R. Co. *vs.* East Tennessee & Geo. R. R., 14 Georgia Rep., 327.
2nd Story Com., §§ 1354-5, 1401, 2, 3.

A promise to pay money is not an agreement of the character intended to be prohibited.

In the beginning of its existence, this Court, by Mr. Justice WILSON, said: "A State, like a merchant, makes a contract. A dishonest State, like

a dishonest merchant, wilfully refuses to discharge it. The latter is amenable to a court of justice upon general principles of right. Shall the former, when summoned to answer the fair demands of its creditors, be permitted, Proteus-like, to assume a new appearance and to insult him and justice by declaring, I am a sovereign State? Surely not."

4 Dallas, p. 456.

In these present years this Court speaks the same language: "The truth is, States and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. *Their contracts have the same meaning as that of contracts between private persons.*"

96 U. S. Rep., 445.

Mr. Chief Justice Taney, in Holmes *vs.* Jennison (14 Peters, 572), following Vattel, gives to the words "compact and agreement" a meaning differing in degree, but not in kind, from the word treaty; and Mr. Justice Story says, in arriving at the same result, that the maxim "*noscitur a sociis*" applies.

2d Story on Const., §§ 1402-3.

It would seem clear that to the case of negotiable bonds issued by a State to individuals, this constitutional clause has no application.

The compact or agreement made in these bonds, so far as the State is concerned, is made with the individuals who take the bonds. One of the features of that contract, given to it by the commercial law, is that it is assignable, and that the assignee takes not only an equitable, but a legal title, and can sue in his own name.

The two States make no contract—an individual assigns to one State a contract he has made with another.

To say that a State could not thus become the assignee of a contract would be going much further than in the illustration put in 14 Georgia, 329, that a State could surely sell to another State a locomotive or other personal property having no political characteristics, without consulting Congress. Suppose a State, a creditor of one of its own citizens, who had bonds of another State, and nothing else, and the bonds unsalable because of threatened repudiation; can there be any doubt of the right of the State to take the bonds in payment, or on account, of the claim? Surely not.

If, then, complainant can become the owner and holder of these bonds, surely it is entitled to the same remedies in this Court to which an individual owner would be entitled, in the Circuit Court, against an individual debtor.

Fourth.—There is nothing in the answer or proofs respecting the gift in controversy in this suit to affect the jurisdiction or the relief.

The most that is claimed is that the donor of the bonds, one Schafer, gave them to the State of South Dakota in the hope and expectation, that the State would bring suit on them in this Court.

The gift was absolute. No possible interest or estate in the bonds was retained in or by the donor.

What is attacked in this case is not as in the Louisiana cases in 107 & 108 U. S., but *the motive*, and the motive of the *donor*. The claim nakedly expressed is that the motive of the *donor* was bad.

The late Mr. Justice CURTIS, in an article published in the *North American Review* for January, 1844, and in his life by his son, B. R. Curtis, of

Boston, Vol. 2d, pp. 93 *et seq.*, said: "Under the common law the King might take an assignment of a debt and sue therefor in his own name. And we have no doubt that the same law exists in all countries.

It seems to follow then that if the sovereign should take an assignment of a claim and sue therefor in the court of a foreign country, the comity and respect due to the foreign sovereign would necessarily prevent the Court from enquiring into the causes and motives of the assignment, especially in a country where the common law exists which makes all debts negotiable between the sovereign and a subject or citizen."

In this case it is impossible to impute to the complainant any improper motive, any more than if the gift had been by a legacy rather than by gift *inter vivos*.

But motive, even in a complainant, is immaterial. The only question is, has the complainant a right? Whether acquired with good, bad or indifferent motives is quite immaterial.

Morris *vs.* Tuthill, 72 N. Y., 575.
Rice *vs.* Rockefeller, 134 N. Y., 174.
Ramsey *vs.* Gould, 57 Barb., 398.
2 Morawetz on Corporations, § 259, and cases cited.
Pender *vs.* Lushington, L. R., 6 Ch. Div., 75–76.
Phelps *vs.* Nowlen, 72 N. Y., 39.

Where, as in the present case, the State owns the whole interest, legal and beneficial, in the bonds sued on, which interest it was empowered to acquire and did acquire by virtue of the act of the Legislature, by a donation from individuals, it makes no difference that the motive of the donor was the hope that the State would bring suit on the bonds.

The question is, is it a real gift, the donor retaining no interest in the thing given? If it be, as in this case it unquestionably is, this Court has repeatedly held that motive is not material.

In McDonald *vs.* Smith, 1 Peters, 620, on p. 624, MARSHALL, Ch. J., says: "The motives which induced him to make the contract, whether justifiable or censurable, can have no influence on its validity. They were such as had a sufficient influence with himself, and he had a right to act upon them. A Court cannot enter into them while deciding upon its jurisdiction. The conveyance appears to be a real transaction, and the real as well as nominal parties to the suit are citizens of different States."

In Barney *vs.* Baltimore City, 6 Wallace, 280, the head note reads, "Although the simple fact that a transfer or conveyance of the subject of controversy is made *for the purpose* of vesting an interest in parties competent to litigate in the Federal Courts does not defeat the jurisdiction, if the transaction vests the real interest in the grantee or assignee—yet if the conveyance or assignment is colorable only and the real interest remains in the grantor or assignor the Court cannot entertain jurisdiction of the case." Says MILLER, J., on page 288: "If the conveyance * * * has really transferred the interest * * *, although made for the avowed purpose of enabling the Court to entertain jurisdiction of the case, it would have accomplished that purpose."

See also

Smith *v.* Kernochan, 7 Howard, 198.

In Dickerman *v.* Northern Trust Co., 176 U. S., 181, the mortgage securing the bonds provided that the bonds should become due if execution should

be issued against the mortgagor company and be not paid.

A suit by a bondholder on six coupons before a Justice of the Peace, appearance by defendant and consenting to judgment and execution, all done to enable the trustees to declare the bonds to be due and bill to foreclose thereupon filed were held insufficient as a defense.

On page 190 the Court said: "If the law concerned itself with the motives of parties new complications would be introduced into suits which might seriously obscure their real merits.

If the debt secured by a mortgage be justly dues it is no defense to a foreclosure that the mortgagee was animated by hostility or other bad motive" (citing many cases).

In Toler *vs.* R. R. Co., 67 Fed. Rep., p. 177, opinion by LURTON, J., it was said, "Whether complainants are conducting this suit from good or bad motives for their own benefit or for the benefit of another is immaterial." It is no defense to a legal demand instituted in the mode and according to the practice of this Court that the complainant is actuated by personal or improper motives." (citing many cases). * * * Were it otherwise, *nearly every suit would degenerate into a wrangle over motives and feelings.*"

Fifth.—The assignment of the bonds of the defendant State to the complainant State carried with it the mortgage of the railroad stock created by the Legislature of the defendant State to secure the bonds.

While authority for this is not needed we cite

Converse *vs.* Michigan Dairy Co., 45 Fed. R., 18.

In this case the company had executed a mort-

gage upon its lands to one Clay to secure fifty-six notes at $1,000 each, and these notes were endorsed and delivered to the plaintiff to secure a loan of $20,000. Severns, J., said that the endorsement and delivery operated as an assignment of the mortgage and transferred to the holder of the notes the same equitable rights in the mortgage which he had in the notes.

Cooper *v.* Ulmann, Walk. Ch., 251.
Briggs *v.* Hannowald, 35 Mich., 474.
Carpenter *v.* Longan, 16 Wall., 271.
Kennicott *v.* Supervisors, 16 Wall., 452.
Ober *v.* Gallagher, 93 U. S., 199.

It will be observed that in these cases only a portion of the notes or bonds were acquired by the complainant seeking to foreclose, and it was held that the transfer to complainant enabled the complainant to carry on the proceeding of foreclosure, because an assignment of a part of the debt, or of one or several bonds or notes, secured by the mortgage carries with it a *proportional* interest in the mortgage.

Sixth.—It appears from the bill, and Exhibit B thereto, that the defendant State made a statutory mortgage to secure the bonds sued on, and the whole issue, in the following language: "The "public treasurer is hereby authorizedand directed, "whenever it shall become his duty under the "provision of said acts, to *issue bonds* of the State "to the amount of fifty thousand dollars or more "*to mortgage an equal amount of stock which* "*the State now holds in the North Carolina* "*Railroad, as collateral security for the payment* "*of said bonds*, and to execute and deliver, with "each several bond, a deed of mortgage for an

"equal amount of stock of said North Carolina "Railroad, said mortgage to be signed by the "treasurer and countersigned by the comptroller, "to constitute a part of said bond, and to be "transferable in like manner with it, as provided "in the charter of said Western North Carolina "Railroad Company; and further, that such "mortgage shall have all the force and effect, in "law and equity, of actual mortgages without "actual registry."

It appears that the defendant State was owner of 30,000 shares of stock in the North Carolina Railroad Company, of the par value of $3,000,000; shares $100 par.

It will be observed that the Treasurer was directed to mortgage an amount of stock *equal to the bond issue*, and that a *proportional* amount of stock was to be made collateral security for the payment of each bond; that is to say, a number of shares of $100 each was to be collateral to each bond, and a number of shares at that figure was to make a sum equal to the par of the bond, and upon the bond there was endorsed a statement to that effect.

This mortgage, in equity, stands as security for all the bonds, and the said bonds, being sold to different persons, the mortgage still stands for all the bonds, *pro rata*.

Such is the general rule with regard to mortgages securing a large number of bonds, and there is nothing in the language of the act of the defendant State showing an intention to *vary the general* rule on the subject. Vast numbers of bonds secured by mortgage have been in use in this country, and nothing is to be observed in the terms of the North Carolina act to indicate any purpose *to vary* the *general* rule. No *specific* shares of stock are attached to any particular bond. The language "ten

shares of the stock" plainly indicates *simply that proportion* out of the whole number of shares of stock mortgaged. The shares of stock mortgaged were an amount equal to the *number of bonds* issued. That is the contract in substance; the actual words are, "When the Treasurer shall issue bonds of the State to the amount of $50,000 or more"—by law he could not issue less than $50,000 at a time—"he shall mortgage an *equal amount of stock* as collateral security for *the payment of said bonds*." Plainly, the *whole amount* of shares of stock becomes security for the whole *amount* of the bonds.

The general rule in equity is stated in 3 White and Tudor's Leading Cases in Equity, 3rd Am. Ed., Wallace's notes to the cases of Row *v.* Dawson and Ryall *v.* Rowles. It is there stated, on p. 646, that where there are different obligations secured by the same mortgage, the mortgage creates a *trust* for the *payment* of all *the obligations*, under which each bondholder had equal claims, and that the question is one of *contract* or *intention* (p. 647).

On p. 369, same vol., is stated the general doctrine given above, that the mortgage is simply security for the debt, and that whatever transfers the debt carries with it the mortgage.

The Supreme Court of Michigan say, in

English *v.* Carney, 25 Mich., 178, 181 (bottom),

that it is settled, in accordance with the weight of authority, that a mortgage given to *secure several obligations* stands as *security for the whole*, and that, if a mortgagee assigns one of the obligations to a third person, the mortgage in equity would stand as security for all the obligations, as well for the one assigned as those retained.

It is further said, at the top of page 182, that

when all the bonds are sold and transferred, each to a different person, the mortgage will stand as an *equal security* for all the obligations, *pro rata*.

The United States Circuit Court of Appeals, 6th Circuit, in

Kortlander *v.* Elston, 52 Fed. R., 180, 183 (bottom),

recognizes the doctrine laid down in the case of English *v.* Carney, and says that in that case it was held on foreclosure that the proceeds of sale must be applied *pro rata* to all the notes, because a *pro rata* application of the security to all the notes was fixed by the original *contract* of the mortgage.

It appears that the defendant State at the time of making the mortgage was the owner of 30,000 shares of stock, of the par value of $3,000,000, and that the mortgage was of such an *amount of stock* as should *equal at par the par* of bonds to be issued in aid of the Western North Carolina Railroad. It also appears that at the time of this mortgage the State's 30,000 shares was subject to a first mortgage to secure 6% thirty-year bonds for $3,000,000, which are known as "first mortgage bonds", so that the bond issue, some of which is owned by the plaintiff State, is secured by a *second* mortgage upon the stock aforesaid.

Indeed, when we consider the nature of a share of the capital stock of a corporation it is apparent that the rule could not be otherwise.

"Each share represents a distinct interest in the whole of the corporate property" (Matter Bronson, 150 N. Y., p. 20; Jermain *vs.* L. S. Ry. Co., 91 N. Y., 483, *492*).

"The stock owned by the plaintiff made him the equitable owner of an undivided fractional part of the entire assets of the Company."

Flynn *v.* Brooklyn City R. R. Co., 158 N. Y., 504.

"The right which a shareholder in a corporation has by reason of his ownership of shares is a right to participate according to the amount of his stock in the surplus profits of the corporation on a division and ultimately on its dissolution in the assets remaining after payment of its debts."

Matter of Fitch, 160 N. Y., 94.
See also 1 Morawetz on Corporations, §§ 234-237.

The State of North Carolina did not own and did not mortgage thirty thousand several and divided shares of the stock of the North Carolina Railroad Company, leaving ten thousand other and divided shares to be owned by others; but the State of North Carolina owned and mortgaged an *un*divided $\frac{30000}{40000}$ or $\frac{3}{4}$ of all the assets of the North Carolina Railroad Company.

A divided share of stock in a corporation is unthinkable. A share is an undivided interest and can be sold, mortgaged or described only as an undivided right or interest.

Seventh.—The first mortgage bonds alluded to under the last head matured in 1879, some *years subsequent* to the issue of the second mortgage bonds, and, of course, the second mortgage bondholders had a right to redeem the first mortgage.

Under those circumstances, the defendant State, in 1879, passed an act to renew the first mortgage bonds by the issue, of a forty year bond at not to exceed 6%, to stand in the place of the original first mortgage bonds; it being provided that the new bonds were not an extinguishment of the old bonds, but a *renewal* and *extension* of the same, and without prejudice to the old bonds. It further appears that, nevertheless, the old bonds were surrendered by

their holders and delivered up to the State, and were destroyed and cancelled; so that the forty-year bonds were in fact new bonds; so that there was a surrender and cancellation of the whole issue of the old bonds by their holders and an acceptance by them of new bonds for a different amount, as more fully appears by Exhibit C, attached to the bill.

Eighth—The holders of the second mortgage bonds were not *parties to* and did *not* consent to the alleged extension of the first mortgage bonds, and if the first mortgage bonds were not actually extinguished, but were, as is claimed by the holders and by the defendant State, *simply extended* as respects the time of their maturity, then the extension as respects the holders of the second mortgage bonds was ineffective. The maturity of the first mortgage could not be postponed without the consent of the second mortgagees, who possessed a vested right to pay off and discharge the first mortgage, at maturity, according to its terms. But if the first mortgage bonds were not extended, but were actually extinguished, then the second mortgage, held by the plaintiff State and the other holders of the same issue of bonds, is a first mortgage.

Mr. Justice CAMPBELL, of Michigan, said: "That a second mortgagee has an absolute right, at any time after the coming due, of a prior incumbrance, to redeem it and be subrogated to it", and further said "that the right of a second mortgagee to redeem a prior mortgage cannot be CUT OFF or PREJUDICED by ARRANGEMENTS BETWEEN the holder of the first mortgage and the mortgagor for an EXTENSION of time to pay it."

Sager *v.* Tupper, 35 Mich., 134.

In Iowa, it was said: "that the right of a second mortgagee to redeem, after the maturity of the prior mortgage, is not affected by the fact that the time of the payment of the debt secured by the first mortgage had been extended, if the junior mortgagee had no notice of the extension (before taking his mortgage.)"

Wheeler *v.* Menold, 81 Ia., 647.

Ninth.—In either aspect of the case, the first and second mortgage bondholders, upon the general principles of equity, being interested in the funds, must be made parties to this suit.

The rule in equity upon the subject is that all persons who have an interest in a suit must be made parties, and it is also a familiar rule that when it is impracticable to bring before the Court all interested, it is sufficient to make such persons parties as have a common interest with those who are absent. In such a case, the parties who are present in the suit represent the rights of those who are absent, and the Court proceeds to make its decree binding the rights of the absent parties.

Story Eq. Pl., 97, 112.
Florida *v.* Georgia, 17 How., 510.

The language of the latter case is by Mr. Justice Curtis, in a dissenting opinion, but not dissenting upon this point.

Upon this rule, the first mortgage bondholders are represented as a class by the defendant Simon Rothschild, a citizen of New York, and the second mortgage bondholders, holding bonds of the issue of which the plaintiff State holds its bonds, are represented by the defendant Charles Salter, also a citizen of the State of New York.

There is no doubt of the proposition that there is jurisdiction between the plaintiff State and two citizens of another State, viz.: the State of New York; just as there is jurisdiction between the plaintiff State and the defendant State of North Carolina; and no objection is perceived to joining the defendant State with two citizens of another State as defendants.

In a recent case, it was held that there was no jurisdiction in this Court in an original suit between a State and citizens of the *same* State, but it was not denied that there was jurisdiction between a State on *one side and citizens* of another State upon the other side; and in the case it was ruled that the Court would not proceed in the absence of citizens of the same State as the plaintiff State, which citizens are indispensable parties, according to the principles of equity. Those parties, it appeared, could not be joined without ousting the jurisdiction, and, consequently, the bill was dismissed.

California *v.* So. Pac. R. R., 157 U. S., 229.

Minnesota *vs.* Northern Securities Co., 184 U. S., 199.

Washington State *vs.* Northern Securities Co., 185 U. S., 255.

This bill makes the senior mortgagees parties, because it seeks the sale of the stock *free from encumbrance;* and it is, *in effect, a bill to foreclose the second mortgage and to redeem from the first.*

It results from the foregoing, that the plaintiff State, bringing all persons in interest before the Court, and both mortgages being overdue, and all bondholders being proportionately interested, is entitled under the rules of equity to press a sale of

the mortgaged property; for the purpose of collecting its own debt.

While in a bill to foreclose a second mortgage it is not required that the first mortgagee be made defendant, yet, when the decree sought is subject to the mortgage of the first mortgagee, and his mortgage is due, he may be made a party; and if, as in the present case, it is asked that the property be ordered to be sold free of encumbrances, the first mortgagee must be made a party, and the bill in such a case is in effect both a bill to foreclose the second mortgage and a bill to redeem from the first mortgage.

GRAY, J., in Heffner *v.* N. W. Life Ins. Co., 123 U. S., 747, *754 top*, and *cases cited*.

See also

Jerome *v.* McCarter, 94 U. S., 734.
Sutherland *v.* L. S. Co., 1 Cent. L. Jour., 127.
McClure *v.* Adams, 76 Fed., 899.

It is proper, in a suit of this kind, to seek to determine the priority of the former mortgage; that is to say, to determine whether it is extinguished, or whether the extension of it was legal, if it was extended.

See

Murdock *v.* Woodson, 2 Dillon, 188.
Board *v.* Min. Pt. R. R., 24 Wis., 93.
Campbell *v.* Texas R. R., 2 Woods, 263.

It may further be said that the certificate upon the bond, with regard to security for 10 shares, being no part of the statute, cannot affect the construction of the statute; and, as to the construction of the statute, the rule is that what is implied in it is as much a part of it as what is expressed.

That is, the intention of the maker of the statute being as much within the statute as it is within the letter, the Court has to ascertain the meaning; which was to mortgage all the stock to secure all the bonds, each proportionately.

U. S. *v.* Babbitt, 1 Black (U. S.), 61.
County of Watson *v.* Natl. Bank, 103 U. S., 770.

It is desirable to consider what litigation has been had concerning the legislation of North Carolina in this regard, particularly the "*Swasey*" Litigation.

1. The North Carolina Railroad Company was incorporated in 1849 to build a railroad from the Wilmington & Raleigh Railroad to Charlotte, and the State Board of Improvement was authorized to subscribe, on behalf of the State, $2,000,000 of the capital stock of the railroad company, and it was provided by Section 38 of the act that if it should become necessary to borrow the money authorized by the act the Public Treasurer should issue certificates in sums not less than $1,000 each, pledging the State for the payment of the sum with interest at 6%, the certificates to be redeemable at the end of thirty years, and that the public faith of the State was pledged to holders of the certificates; and, in addition thereto, *all the stock* held by the State of North Carolina should be and was pledged for that purpose, as also the dividends and profits; and it was made the duty of the Treasurer to pay interest out of any moneys in the treasury.

Under this legislation certificates were issued to the amount of $1,858,000, on which the money was borrowed.

February 14, 1855, another act was passed for the completion of the North Carolina Railroad, and the Public Treasurer was authorized to subscribe $1,-

1,000,000 more to the capital stock, and to make payment therefor by selling bonds of the State under the same restrictions as above, and the same securities were given for the payment and redemption of the certificates.

Mr. *Swasey* owned five certificates of the first issue and two of the second, and prosecuted his action for the benefit of all bondholders who might come, and about $1,800,000 indebtedness is represented in the suit. When the action was commenced no certificate of stock upon their subscriptions had been issued by the company, but upon the order of the Court in the suit, the *proper certificates were* issued and put in the hands of a Receiver who was appointed in the case and who collected the dividends, and these dividends were applied to the payment of interest. A large amount of interest being in arrears, Swasey asked by his suit that a sufficient amount of the stock might be sold to pay what was past due. The objection was made by the North Carolina Railroad Company that the State was not a party to the suit and was a necessary party. It was held by Waite, C. J., holding the Circuit Court, that the case was ruled by Osborn *v.* U. S. Bank, 9 Wheat., 738, authorizing jurisdiction of cases affecting the property of the State in the hands of its agents without making the State a party, and the question presented was, therefore, whether the property which was sought to be charged in the suit was within the jurisdiction of the Court, and whether the agent of the State having that property in possession was within the jurisdiction of the Court. The property of the State, the Chief Justice held, consisted of *shares* in the *capital stock*, which was charged as *security for the payment* of the *debt of the State*. The company was the depository of the pledged stock, to hold for both parties, according to their interest; consequently, a suit seeking to charge *the stock* as

security, and bringing in *the corporation*, it was held might be maintained in the *absence* of the State as a party.

It was further said that a lien was given upon the stock as security, and that it was the *understanding* that *the State should* permit the *bondholders* to use *the courts* to subject *this portion* of the security to the payment *of the* debt. And it was further held that the security was for the interest as well as for the principal. Consequently the Court held that Mr. Swasey, and those whom he represented, were entitled to have *their proportion of* the stock, or so much as might *be necessary, sold in* order to pay the interest past due upon the bonds. And the Court further held that the security was divisible, and should be apportioned to the various bondholders according to the amount of their respective claims, and that each bondholder should have an *amount of* stock which bears the *same proportion* to the whole stock that *his bonds* do to the *whole* amount outstanding.

It was further held that the Court would not order a sale of the stock until time had been given to the State to provide by levy and collection of taxes the necessary funds for paying the interest.

Swasey *v.* North Carolina, 1 Hughes (U. S.), 17.

An appeal was taken from this decree to this Court, where there was a motion to dismiss because the decree below was not a final decree. The case is stated in the report a little differently from the above, and it is said that the State received the dividends upon the stock and *appropriated the money to purposes other than* the payment of interest, and the interest not being paid Swasey filed his bill, praying (1) to restrain the treasurer of the railroad company from paying any *more* dividends to the State ; (2) to restrain the State Treasurer

from *receiving* any more dividends, and (3) for the appointment of *a receiver*. It is further stated that upon argument before the Circuit Judge the injunction was *awarded as prayed*, that a receiver was appointed, and that the *Receiver collected* several dividends from the railroad company and distributed those dividends under the orders of the court, but it becoming evident that the arrears could not be paid without *selling* the stock the court decreed that the stock should *be* sold, reciting that by the terms of the charter of the railroad company *all the shares and dividends* were pledged as security *for the payment* of the certificates, and that the plaintiff and those he represents were entitled to have their respective *proportions* of the stock, or so much thereof as might be necessary, sold to pay the *past due* interest; and the receiver was ordered to take an account of the unpaid interest and of such proportion of the stock of the State in the railroad company as might be equitably applicable to the payment of the interest found due to each of the stockholders.

This Court said that the lower court had done no more than to declare that the certificate holders had a lien upon their equitable portion of the stock, which lien was *enforceable* by sale, and had ordered an account stated of the indebtedness to the certificate holders in the suit of their proportion of the stock pledged by the State; and the Court said that inasmuch as the order below was only interlocutory the appeal could not be sustained.

R. R. Co. *v.* Swasey, 23 Wall. (U. S.), 405.

These two cases hold, in regard to legislation similar if not identical with the legislation considered in the case at bar, that all the stock *was* security *for each* certificate, and the court would ascertain *the*

amount of stock *equitably* applicable to each certificate.

2. In a subsequent case, *this Court* disapproved the holding of the Chief Justice at the circuit in *some respects*, and said that the purpose of the Swasey suit was to obtain an adjudication of the lien upon the stock held by the State in the railroad company, and upon the dividends of the stock, and the enforcement of the lien by requiring dividends to be paid to bondholders, and by a *sale* of the stock itself if necessary, and by the appointment of a receiver to take possession of the dividends, and by an injunction to restrain the company from applying the dividends to any other purpose than payment to the bondholders.

This Court goes on to say that dividends due to the State could not be seized and appropriated to the payment of bonds, and that the stock owned by the State could not be sold by means of a suit in equity without *making the State* a party. The Court said that the ground upon which it was claimed that this might be done was that the property is affected by the pledge, and might, therefore, be dealt with *in rem*. The Court, however, said that it could not be dealt with *in rem* without the presence in the suit of the *party creating* the pledge, if a pledge was created, and said that the proceeding was really a suit *against the party* making the mortgage to obtain by decree the benefit of the mortgage right, and that where the mortgagor in possession is a sovereign State the proceeding could not be obtained at the suit of an individual.

This Court further said that the views of the Chief Justice on circuit seemed to have been based on the idea that the stock of the State was lodged in the agents of the railroad company, as trustee for the parties concerned, and was *not in the hands*

of the State itself or of its immediate officers and agents; and further said that the State is an *indispensable* party to any proceeding in equity in which its property is sought to be taken and subjected to the payment of its obligations.

Christian *v.* Atl. & Nor. Car. R. R., 133 U. S., 233.

3. In another case, where there was a foreclosure of a mortgage, a party claiming to be the owner of the majority of the bonds secured applied to be made defendant for the purpose of resisting foreclosure; and it was said that he ought to be allowed to *intervene* to protect his interest, it appearing that the mortgage was of railroad stock for the *equal, pro rata* benefit of all holders of the bonds secured thereby. It was further said that it was not *necessary* before decree that the bonds and coupons should be *produced*, or that each claimant of a bond or unpaid interest should identify himself as an owner before decree. It was further said that *motives* of complainants in conducting the suit could not be inquired into, because it would be no *defense to a legal demand that* the complainant is actuated by personal or improper motives.

In this mortgage it was *recited* that the purpose for which it was made was "for the *equal pro rata benefit of all the* holders of the bonds *secured* thereby, without any preference or priority of one bond over another." And it was accordingly held that the distribution should be *pro rata* of all the bonds, principal and interest, and that each beneficiary would be entitled to a *ratable proportion* of the value of the whole property, to be ascertained by *public* sale.

Toler *v.* East Tenn. R. R. Co., 67 Fed., 168.

In another case there was an issue of bonds secured by a first mortgage, to take up those of a prior issue, but the new issue was larger than was necessary. A suit was brought by the bondholders of the second mortgage to foreclose, and it was held that the surplus bonds above mentioned, whether actually issued or not when the second mortgage went into effect, were secured by the first mortgage equally with the bonds which were not a part of the surplus, and that the first mortgage bonds remaining unissued could be issued by the company after the date of the second mortgage so as to carry a lien under the first mortgage.

Claflin *v.* S. C. R. R., 8 Fed., 118; Waite, C. J.

In another case, where, by the charter of a bank, stockholders were held responsible for the debts of the bank in *proportion* to their stock, it was said that there being numerous creditors one creditor could not proceed to appropriate to himself the entire benefit of the security to the exclusion of other creditors, but should proceed in equity to have an accounting of the debts and stock and a *pro rata* distribution among the stockholders. This was said to be the *intention* of the State, viz., that a distribution *pro rata* should be made; that the *common fund* was created for the common benefit, to be collected and distributed by the receiver as the common agent of all.

Pollard *v.* Bailey, 21 Wall., 520.

In another case it was decided that if by the terms of the contract the whole property covered by the mortgage to secure an issue of bonds is pledged to each bondholder, then the *contract is clearly* that each bondholder shall receive the *pro rata* share of the whole security which his bond

bears to the whole series; and it was said that where a mortgage secures the whole number of bonds, in a distribution of the proceeds of sale, each bond carries only a fractional interest in the proceeds, which interest is to be ascertained by the proportion which its amount bears to the whole amount secured.

Barry *v.* M. K. & T. Ry., 34 Fed., 829.

In such cases, equities adjudged against parties served with process are binding upon all *persons of the same* class, although absent from the litigation, because of the vicarious representation in the present litigants of the same class to which they belong.

Morton *v.* New Orleans R. R., 75 Ala., 590, 611.

See also

Knickerbocker Trust Co. *v.* Penacook Mfg. Co., 100 Fed., 814.
Dickerman *v.* Nor. Trust Co., 80 Fed., 450.

Tenth.—The construction of the clauses of the Constitution giving jurisdiction to this Court over controversies between States and between States and citizens of other States should be liberal in the extreme to favor such jurisdiction and to carry out the beneficent purposes by the Constitution sought to be obtained.

There is a school of thought or method of construction which is well illustrated in the dissenting opinion of Mr. Justice Iredell in Chisholm *vs.* Georgia.

This method is based upon and is the product of

conceptions which prevailed prior to the adoption of the Constitution and which, to those adopting it it seems impossible that the Constitution could have been intended to supersede.

Another illustration of this method may be found in the remarks of Mr. Justice BRADLEY in Hans *vs.* Louisiana, 134 U. S., 15. Says the learned Justice: "The truth is that the cognizance of suits and actions *unknown to the law* was not contemplated by the constitution when establishing the judicial power of the United States," also on pp. 13 and 14, "Adhering to the mere letter it might be so; and so in fact the Supreme Court held in Chisholm *vs.* Georgia; but looking at the subject as Hamilton did and as Mr. Justice IREDELL did in the light of history and experience and the *established* order of things, the views of the latter were clearly right —as the people of the United States in their sovereign capacity subsequently decided."

On the other hand there is a school of thought or method of construction which is well illustrated in the prevailing opinions of the Court in Chisholm *vs.* Georgia.

This method is based upon and is the product of the conception that the habits and practices of nations which existed prior to the adoption of the Constitution were productive of grave evils which, so far as the States which proposed "to form a more perfect union" were concerned, might be avoided or greatly modified, and that the Constitution was designed to and had modified them and did not perpetuate them.

Said Mr. Justice WILSON, p. 463, after commenting on evils to be remedied: "In order therefore to form a more perfect union to establish justice to insure domestic tranquillity, to provide for common defense, and to secure the blessings of liberty

those people among whom were the people of Georgia ordained and established the present constitution. By that constitution legislative power is vested, executive power is vested, judicial power is vested."

Another illustration may be found in the opinion of Mr. Justice CUSHING (p. 467): "One design of the general government was for managing the great affairs of *peace and war* and the general defence, which were impossible to be conducted with safety by the States separately. Incident to these powers and for preventing controversies between foreign powers or citizens from rising to extremities and to an appeal to the sword, *a national tribunal was necessary*, amicably to decide them, and thus ward off such fatal public calamity. * * * As controversies between State and State and between a State and citizens of another State might tend, gradually, to involve States in war and bloodshed, a disinterested *civil* tribunal *was intended to be* instituted to decide such controversies, and preserve peace and friendship."

Between these parallel lines of reasoning a choice must be made. Each is logically perfect enough in itself. The choice must be made at the start. Was the Constitution adopted as a mere amendment or modification of the existing order of things, or was it a radical change and intended to destroy evils theretofore supposed necessarily to be permanent, and to supply remedies theretofore unknown?

We claim that the latter is the true construction, and to maintain our contention we call attention to the evils then existing, and which it was intended to remedy.

During the period preceding the Constitution covered by history "government" meant the administration of the affairs of an organized political

community, in the interest, and for the benefit, of the governors.

When these governors, whether called consuls, kings, emperors, aristocracies, or by any other name, wanted more power, wealth or glory, *war* was the means by which they sought it, and patriotism the high name under which they attempted to justify acts that between individuals would be called robbery and murder.

Human society had made but little advance by organization into political communities, for they were all in arms against each other, animated by the same spirit of aggression and selfishness that is supposed to have prevailed in the most primitive human society.

The cause of our revolution is a good illustration of the general condition.

England was engaged in wars in which her American colonies had no interest. She assumed to tax us for her own benefit, without our being represented in her Parliament, and the war for independence followed.

With the end of that war; with the abandonment of the articles of confederation under which it had been carried on—and with the adoption of the Constitution there came a new era in the political history of mankind.

We were thirteen "sovereign and independent" States; each having the high "sovereign" right to injure any of the others by war or any minor method—each having the right to negotiate and make treaties with each other—each having the right to prohibit or allow personal or commercial intercourse and to provide the terms on which it should be allowed.

Now, what was done and what was the great principle on and through which this, our Union, was secured?

The answer is, that so far as the thirteen original

States and the others which have since been admitted are concerned, that the right to make war upon each other, *for any cause and upon any pretense*; the right to make treaties with each other; the right to enact tariffs against each other; the right to exclude the citizens of one from any rights, privileges or immunities in another enjoyed by the citizens of that other, and many other rights of mutual injury and destruction which had been enjoyed by "sovereign states" from time immemorial were given up and abandoned; and in their place was established this Court, wherein all the questions which might or could arise between these "sovereign states" should be decided; not by clash of arms; not by the method and in the manner of the wild animals of the world; but, in the language of one of the justices of this Court, "in the peaceful forms of judicial procedure."

Let us see for a moment what the Constitution did to the States of the Union.

It provided that "No state shall enter into any treaty, alliance or confederation, grant letters of marque and reprisal; coin money; emit bills of credit, make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts or grant any title of nobility."

No State shall, without the consent of Congress, lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of Congress.

No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement, or compact with another state, or with a foreign

power, or engage in war unless actually invaded, or in such imminent danger as will not admit of delay."

Think for a moment of the numberless things which one and another of these States has tried to do in contravention of these prohibitions; think of the conflicts and wars which would have resulted with all the horrors and miseries which attend such methods of solution of controversies, and then think of the constitutional method by which the controversies have been actually settled. The peaceful form of judicial procedure, the adjudication by the tribunal provided by the Constitution—the Supreme Court of the land; the elimination of the old method, the inauguration of the new. To our minds that seems the longest step in human progress and human civilization ever taken; the largest and broadest and happiest political generalization ever conceived by the human mind.

Now, we submit that it is impossible to consider a question of the jurisdiction of this Court under the Constitution as isolated and depending only on the judiciary clauses.

They are part of one great whole. They are part of one great political conception which never before had been even shadowed to mankind. They are part of a new plan of justice and peace.

How can we construe this Constitution as advised by the dictum of Mr. Justice BRADLEY (*nomen venerabile*) "in the light of history and experience and the established order of things" when the very purpose and object of its adoption were to overturn and destroy "the established order of things" and to institute a new order of things in the place of the old, which "history and experience" had shown to be bad?

Never before was a court known having jurisdiction to decide upon the validity of acts by the ex-

ecutive or the legislative branches under the Constitution.

Can it be supposed that such changes as we have enumerated were conceived or thought of as mere amendments or modifications of an old order of things? That in the construction of the Constitution we are to be guided and governed by the notions prevailing when to a few great men was revealed the new light and hope for human progress?

Is it not, rather, our duty to recognize and familiarize ourselves with the new order of things; to see that to the judiciary is given in that new order the very highest and most responsible function; that of the universal solvent of all controversies that can possibly arise as well between "sovereigns" as between individual citizens?

Looked at in that light, judged by that standard, how small and trifling seem such objections to the jurisdiction over this controversy between States, as that the donor hoped that such controversy might supervene or that others, not donors, might incidentally reap some advantage.

Looked at in the spirit of the Constitution, can there be a grander spectacle than the submission to this Court of this controversy between two States and their loyal acceptance of its decision?

Eleventh. ~~Fourth.~~ Plaintiff should have a decree as prayed for in the bill of complaint.

WHEELER H. PECKHAM,
R. W. STEWART,
Of Counsel for Complainant.

No. 8 Orig.

Motion for leave to take testimony

Supreme Court of the United States

OCTOBER TERM, 1901.

Filed May 5th 1902.

No. 11, Original.

THE STATE OF SOUTH DAKOTA

against

THE STATE OF NORTH CAROLINA ET AL.

MOTION FOR LEAVE TO TAKE TESTIMONY.

And now comes The State of South Dakota and moves the court that the testimony in this case be taken orally in the same manner as provided for the taking of testimony in the circuit courts of the United States, sitting in equity, by rule 67 of the rules of practice in equity promulgated by this court, and that any person or persons agreed upon by the parties to this case, not in default for want of an answer, may act as commissioner to take such testimony, the same as if he had been specially appointed by this court, and that in default of such agreement any justice of this court may appoint such commissioner or commissioners; that one or more commissioners may be appointed, each to take testimony in any named locality, and each to act as if he were

sole commissioner; that the time to take such testimony be limited to the first day of October next, and that the same be returned to this court and filed with the clerk thereof on or before the first Monday of October, 1902.

JOHN L. PYLE,
Attorney General of the State of South Dakota.
ROBERT W. STEWART,
Solicitor for the State of South Dakota.

WHEELER H. PECKHAM,
Of Counsel for the State of South Dakota.

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1901.

STATE OF SOUTH DAKOTA
against
STATE OF NORTH CAROLINA ET AL. } No. 11, Original.

FORM OF PROPOSED ORDER.

The State of South Dakota having filed its replication to the answer of The State of North Carolina, and moved for the appointment of commissioners to take testimony, now, on motion of counsel for complainant, The State of South Dakota, it is—

Ordered, that the testimony in this case be taken orally, in the same manner as provided for the taking of testimony in the circuit courts of the United States, sitting in equity, by rule 67 of the rules of practice in equity promulgated by this court, and that any person or persons agreed upon by the parties to this case, not in default for want of an answer, may act as commissioner to take such testimony, the same as if he had been specially appointed by this court, and that

in default of such agreement any justice of this court may appoint such commissioner or commissioners; that one or more commissioners may be appointed each to take testimony in any named locality and each to act as if he were sole commissioner; that the time to take such testimony be limited to the first day of October next, and that the same be returned to this court and filed with the clerk thereof on or before the first Monday of October, 1902.

[Endorsed:] Supreme Court U. S., October term, 1901. Term No. 11, original. The State of South Dakota, complainant, *vs.* The State of North Carolina *et al.* Motion for leave to take testimony and form of proposed order. Filed May 5th, 1902.